IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-1294

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

The Memorandum in Opposition to the Petition for Writ of Certiorari asserts, at page four, that the L&N's contention "that the Commission's conciliation efforts were inadequate in this case" "was not made in the district court or the court of appeals, and neither court considered it."

That assertion is patently erroneous.

The Motion to Dismiss filed by the L&N on November 30, 1973 specifically attacked the sufficiency of the Commission's conciliation efforts in two respects.[1] (Reply App. I). That motion was supported by evidence (Reply App. II) and was clearly considered by the district court. (Reply App. III).

[1]For the convenience of the Court, pertinent portions of the Appendix below, the opinions below and the briefs of the parties are reproduced as Appendices to this Reply brief. Reference to this material will be indicated as (Reply App. ....). Emphasis has been added, where necessary, by italicization.

On appeal, the issue was raised by the L&N in brief (Reply App. IV), was responded to by the EEOC both in brief (Reply App. V) and in oral argument,[2] and was in fact considered by the court of appeals. (Reply App. VI). The issue was again dealt with in the L&N's Petition for Rehearing (Reply App. VII).

The issue of the compliance by the Commission with its duty to conciliate is properly before this Court and is one needful of resolution.

Respectfully submitted,

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[2]At oral argument, counsel for the Commission specifically attempted to deal with *Brennan v. Ace Hardware Corp.*, 495 F.2d 368 (8th Cir. 1974).

CERTIFICATE OF SERVICE

This is to certify that on this 20 day of June, 1975, three true and correct copies of the foregoing Petitioner's Reply Memorandum on the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were served on Counsel for the Respondent; on the Solicitor General of the United States and on Counsel for the Chamber of Commerce of the United States of America by depositing the same in the United States Mail, with air mail postage prepaid, and addressed to Ms. Debra A. Millenson, Equal Employment Opportunity Commission, 1800 G Street, N.W., Washington, D.C. 20506; The Solicitor General of the United States, Department of Justice, Washington, D.C. 20530; and Gerard C. Smetana, Esq., Borovsky, Smetana, Ehrlich & Kronenberg, 2011 Eye Street, N.W., Suite 800, Washington, D.C. 20006.

CHARLES A. POWELL, III

REPLY APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	)	
vs.	)	CIVIL ACTION
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Defendant.	)	73-H-665

MOTION TO DISMISS

. . . .

6. The Equal Employment Opportunity Commission has not been unable through informal means of conference, conciliation and persuasion to eliminate the alleged unlawfully practices or to secure conciliation agreement acceptable to it but on the contrary has *obstinately refused to attempt conciliation within the meaning of the Act;*

7. This action is an equitable action and, because of the plaintiff's failure to comply with its own regulations and its *failure to in good faith seek conciliation* as required by Title VII of the Civil Rights Act of 1964 the plaintiff does not come into this Court with clean hands and may not be allowed to prosecute this action.

. . . .

9. On, to-wit, the 10th day of September, 1973, this Court ordered the plaintiff to undertake to conciliate this matter through its district director; *the plaintiff has failed and refused contumaciously fails and refuses to comply with this Court's* order. The plaintiff being in contempt of this Court may not now be heard to prosecute this action.

REPLY APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	)	
vs.	)	CA 73-665-S
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Defendant.	)	

AFFIDAVIT OF E. E. HOLCOMB

. . . .

A meeting was arranged in Birmingham, Alabama for March 9, 1972, with EEOC Conciliator Edward J. Kirst. The L&N representatives attending this meeting with Mr. Kirst were Mr. E. H. Key, L&N's District Employment Officer at Birmingham, and Mr. Weas and me, both from Louisville, Kentucky. The purposes of this meeting were to discuss the Ben Thomas case, the Commission's Decision in that case and to commence efforts to resolve our differences with the EEOC by voluntary conciliation as provided by the Civil Rights Act. We pointed out to Mr. Kirst that, since the Director's Findings of Fact had been confined solely to Mr. Thomas' EEOC charge involving his discharge, *L&N had never been accorded the opportunity to present its side of the case to the Commission* beyond that involving Mr. Thomas' discharge. *Mr. Kirst stated that he was bound by the EEOC Decision and that there could be no discussion relating to the reasons or bases of the Commission's Decision.* Mr. Kirst submitted a draft of a written proposal for conciliation which Mr. Weas and I took back to Louisville for necessary consideration by all persons in L&N management. During the meeting on March 9, 1972, Mr. Kirst stated that it would be necessary for the Charging Party, Mr. Ben Thomas,

to sign any conciliation agreement that might be reached, and that this could pose a problem because they were not sure they could locate Mr. Thomas in order to obtain his signature. Mr. Kirst stated to us his version of the points involved as (1) the discharge of the Charging Party, (2) the use of arrest record information, and (3) the use of the pre-employment tests.

On April 4, 1972, Mr. Weas notified Mr. Kirst that his proposal was still under consideration by L&N management and that Mr. Kirst would be advised in writing later as to L&N's decision. *Mr. Weas requested that Mr. Kirst contact him if he had any questions in the meantime.*

The next communication of any nature between EEOC representatives and L&N representatives involved in the handling of the Ben Thomas charge was a letter dated May 31, 1972, from Mr. Wesley N. Harry, Acting District Director of the Birmingham District Office of the EEOC, and a copy of a letter dated May 31, 1972, from Mr. Harry to Mr. Ben E. Thomas, which was an authorization to Mr. Thomas to institute a civil action. Copies of both of these letters are attached hereto, made a part hereof, and are marked as "Exhibit H" and "Exhibit I", respectively. L&N representatives received no other communication of any nature from EEOC representatives pertaining to the Ben E. Thomas charge. Mr. Ben Thomas did not institute any suit against the L&N.

In the course of what we believed to be ongoing efforts at conciliation, the EEOC representatives issued this "right to sue" letter to Mr. Thomas. Such "right to sue" notification, according to my understanding, issues only upon a failure of conciliation or at the request of The Charging Party. We were never notified that the Charging Party had made such a request and it was my opinion that the EEOC had unilaterally terminated conciliation efforts. My opinion was later substantiated by the fact that Mr. Ben E. Thomas has never instituted any civil action against the L&N. *The L&N never received any notice from the EEOC as provided for in EEOC Regulation § 1601.23 (29 CFR 1601.23).*

Nothing further occurred in the handling of the Ben Thomas charge until Civil Action No. 73-H-665 was filed. I requested counsel for the L&N handling this civil action to attempt to obtain a stay in order to permit me and the EEOC District Director at Birmingham, or a conciliator appointed by him, to resume conciliation efforts in the Ben Thomas case. This Court's Order granting such a stay was entered on September 10, 1973, and I learned of the entry of this Order on September 11, 1973, at which time I called Mr. Clarence Bell, EEOC District Director at Birmingham, and offered to make myself available at any time to meet with him or a conciliator from his staff. Mr. Bell stated to me that he or a conciliator from his staff would be willing to engage in such conciliation efforts provided the EEOC lawyers had no objections. Later the same day, Mr. Bell informed me that the EEOC lawyers did object to such conciliation efforts between Mr. Bell's office and me. A copy of my letter of September 12, 1973 to Mr. Bell and a copy of Mr. Bell's letter of September 21, 1973 to me are attached hereto, made a part hereof, and are marked as "Exhibit J" and "Exhibit K", respectively.

/s/ E. E. HOLCOMB

E. E. HOLCOMB

In the United States District Court for the
Northern District of Alabama
(Southern Division)

(CA 73-665-S)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF
v.
LOUISVILLE & NASHVILLE RAILROAD CO., DEFENDANT

(Filed in Clerk's Office, Northern District of Alabama
November 9, 1973)

Report on Conciliation

This report is submitted by the defendant in compliance with the Court's order of September 10, 1973.

. . . .

CONCLUSION

We have regretfully concluded that the plaintiff's attorneys, as opposed to the plaintiff's District Director, have no intention of entering into meaningful conciliation efforts. We suggest that implicit in the Court's order was a requirement that the parties proceed in good faith to attempt conciliation of the matters underlying this action.

. . . .

The defendant remains convinced that there was and still is a high degree of probability that good faith conciliation efforts would prove fruitful. Unfortunately, the present posture of the plaintiff, speaking through its General Counsel, is such that the Court's earlier order has been frustrated and the stay is now at its end.

. . . .

REPLY APPENDIX III

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	)	
vs.	)	CA 73-H-665-S
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.	)	

MEMORANDUM OPINION

This cause was heard at the regularly scheduled motion docket on January 4, 1974, on the motion of defendant Louisville and Nashville Railroad Company to dismiss the complaint or in the alternative for summary judgment. Since resolution of the issues raised by this motion requires reference to affidavits and exhibits extrinsic to the complaint, the motion will be disposed of as one for summary judgment. *In ruling on this motion the Court is relying on* (1) the complaint, (2) *the affidavits and exhibits attached to defendant's motion to dismiss and defendant's report on conciliation,* (3) the affidavits and exhibits attached to the Commission's memorandum in opposition to defendant's motion to dismiss, and (4) argument of counsel.

. . . .

DONE this 8th day of January, 1974.

/s/ JAMES H. HOWARD

United States District Judge

REPLY APPENDIX IV

(Brief of L&N in Court of Appeals.)

THE COMMISSION MAY NOT PROSECUTE AN ACTION UNDER § 706(f)(1) WHERE IT HAS FAILED TO COMPLY WITH THE CONDITIONS PRECEDENT OF § 706(f)(1)

In addition to the two grounds relied upon by the district court, the pleadings raised several additional issues, each of which supports affirmance of the judgment below. The Act requires, . . . that the Commission attempt to conciliate with the respondent. While a limited charge was filed in this case (A. 56), the L&N was never accorded an opportunity to respond to the allegations upon which this action is based, *nor have there been any good faith efforts by the EEOC to resolve those issues through conciliation.*

. . . .

The Commission Failed to Seek Conciliation in Good Faith

. . . .

The record in this case clearly discloses repudiation by the Commission of conciliation. While the Commission's District Director and the L&N were, as late as September 11, 1973, seeking to meet to continue conciliation efforts (A. 18) those efforts were frustrated by the "Atlanta Litigation Center" (A. 19). We respectfully suggest that the Commission's unilateral termination of conciliation, its failure to comply with its own regulations relating to conciliation and the posture adopted by its General Counsel when ordered to conciliate clearly show that the Commission has not satisfied, on the facts of this case, the statutory condition precedent to the prosecution of this action.

REPLY APPENDIX V

(Reply Brief of EEOC in Court of Appeals.)

2. *The Facts Of The Commission Investigation And Conciliation Process Are Not Subject To Judicial Review.*

Appellee L&N seeks to have this Court review the factual adequacy of the Commission's investigatory and conciliatory efforts prior to suit. The power of a court to review such efforts is limited to the fact of their occurrence and does not extend to their substance.

REPLY APPENDIX VI

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellant,

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant-Appellee.

No. 74-1185.

United States Court of Appeals, Fifth Circuit.

Dec. 16, 1974.

Before MOORE*, AINSWORTH and RONEY, Circuit Judges.

AINSWORTH, Circuit Judge:

. . . .

III. L&N's Other Contentions

[8-10] Defendant offers three other grounds for affirming the judgment below. . . . *L&N also contends* that the Commission did not execute all the steps that are conditions precedent (charge, notice, investigation, finding of reasonable cause, attempted conciliation) to filing suit, and *that the Commission did not seek conciliation in good faith.*

. . . .

REPLY APPENDIX VII

(Petition of L&N for Rehearing in Court of Appeals.)

II.

PANEL DECISION CREATES A CONFLICT IN STANDARDS TO BE APPLIED TO IDENTICAL FUNCTIONS PERFORMED BY DIFFERENT AGENCIES IN ADMINISTERING SUBSTANTIALLY SIMILAR STATUTES.

. . . .

The panel majority did not deal with the dichotomy created by its holding vis-a-vis the parallel provisions of the Age Discrimination in Employment Act. We suggest that there is no sound basis for the creation of incompatible standards where two acts are identical in intent, involve virtually identical terms and differ only in the identity of the enforcer. "Conciliation" as a method of dispute resolution should carry the same meaning and be subject to the same standard without reference to whether the alleged discrimination is predicated on race or age.